

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8360

File: 20-214421 Reg: 03055183

7-ELEVEN, INC., and PARNELL WASLIEN dba 7-Eleven 2173 18778
7600 Sunset Boulevard, Los Angeles, CA 90028,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: September 1, 2005
Los Angeles, CA

ISSUED: NOVEMBER 9, 2005

7-Eleven, Inc., and Parnell Waslien, doing business as 7-Eleven 2171 18778 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for their clerk having sold an alcoholic beverage (a 24-ounce can of Budweiser beer) to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Parnell Waslien, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated November 4, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. The Department instituted an accusation against appellants on June 17, 2003, charging that appellants' clerk, Jose Villatoro, sold an alcoholic beverage (beer) to Michael Shea, a 19-year-old minor. Shea was acting as a police decoy for the Los Angeles Police Department.

An administrative hearing was held on September 22, 2004, at which time oral and documentary evidence was received. The Department presented the testimony of Shea, the decoy, and that of four Los Angeles police officers involved in the decoy operation. Appellants did not present any witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and ordered the stayed suspension from which this timely appeal had been taken.

Appellants raise the following issues: (1) appellants were denied due process; and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process when the attorney representing the Department at the hearing before the administrative law judge (ALJ) provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants alleged due process violations similar to those raised in the present

case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").²

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt, supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result.

² The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellants at the hearing. Appellants have not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellants have not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellants, it appears to us that appellants received the process that was due them in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

II

Rule 141 (Title 4, Cal. Code Regs. §141) sets forth certain minimum standards relating to the use of decoys, and provides that the failure to comply with such standards gives rise to an affirmative defense to a charge of violation of Business and Professions Code section 25658. Rule 141(b)(2), one of those standards, provides that

a decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

Appellants contend that the decoy in this case did not display the appearance required by the rule, pointing to his demeanor, his previous experience in other decoy operations, his aspirations for a career in law enforcement, and to the fact that he was able to purchase an alcoholic beverage in four of the eight premises he visited.

Appellants' arguments were rejected by the ALJ, who concluded that the decoy displayed the appearance required by rule 141(b)(2). It is clear from what he wrote that he carefully considered the issue, stating (Findings of Fact VI-VIII):

VI. The decoy was 5'6" tall and weighed 125 pounds on February 1, 2003. He wore a white, silk shirt and black jeans. His hair was thick and parted in the middle. He was a little nervous while in Respondent's store, even though he had previously participated in four decoy operations, visiting approximately 25 premises, before February 1. Two photographs of the decoy and a photograph of the decoy with Villatoro, all taken on February 1, 2003, show the decoy displayed the appearance which could generally be expected of a person under twenty-one years old.

The decoy's father is a police officer. The decoy is interested in pursuing a career in law enforcement. There is no evidence that either of these facts made the decoy appear older, or younger, than his age.

VII. The decoy was 5'8" tall and weighed 145 pounds on the day of the hearing. Other than having gained approximately twenty pounds, the decoy appeared similar to his appearance in the photographs. His hair was still thick and parted in the middle. He appeared calm when he testified. (Because the decoy's height is not obvious in the photographs, the fact that the decoy was two inches taller on the day of the hearing is also not obvious.)

VIII. The Administrative Law Judge observed the decoy's mannerism, demeanor, and maturity while he testified. Based on this observation, the testimony about the decoy's appearance, and the photographs, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when he purchased the beer from Villatoro.

The ALJ expressly considered the decoy's interest in law enforcement, as well as the fact that his father is a police officer, factors appellants stress, and found that neither made him appear older than his actual age.

We have pointed out so often as to require no citation to authority that the ALJ's factual determination regarding the decoy's appearance will not be questioned in the absence of extraordinary circumstances. The ALJ has the opportunity to observe the decoy as he testifies, weigh his physical appearance and demeanor, as well as other possible indicia of age, while this Board has only a photograph and the cold record.

There is no reason to question his judgment here.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.